H 2322

U. S. Coast and Geodetic Survey
W. W. Duffield, Superintendent

KARLUK,
KADIAK ISLAND,
ALASKA

U.S.F.C.S. Albatross
Lieut. Comdr. J.F. Moser, U.S.N. Commanding
August 1897.
Soundings in fathoms.
Scale 1/10000
Nautical miles

Authorities.
Control triangulation by Lieuts. H.E. Parmenter and J.P. McGuinness, U.S.N.

Scale 1/10000
Nautical miles

Authorities.
Control triangulation by Lieuts. H.E. Parmenter and J.P. McGuinness, U.S.N.
Hydrography by Ensign Y. Sterling, U.S.N.

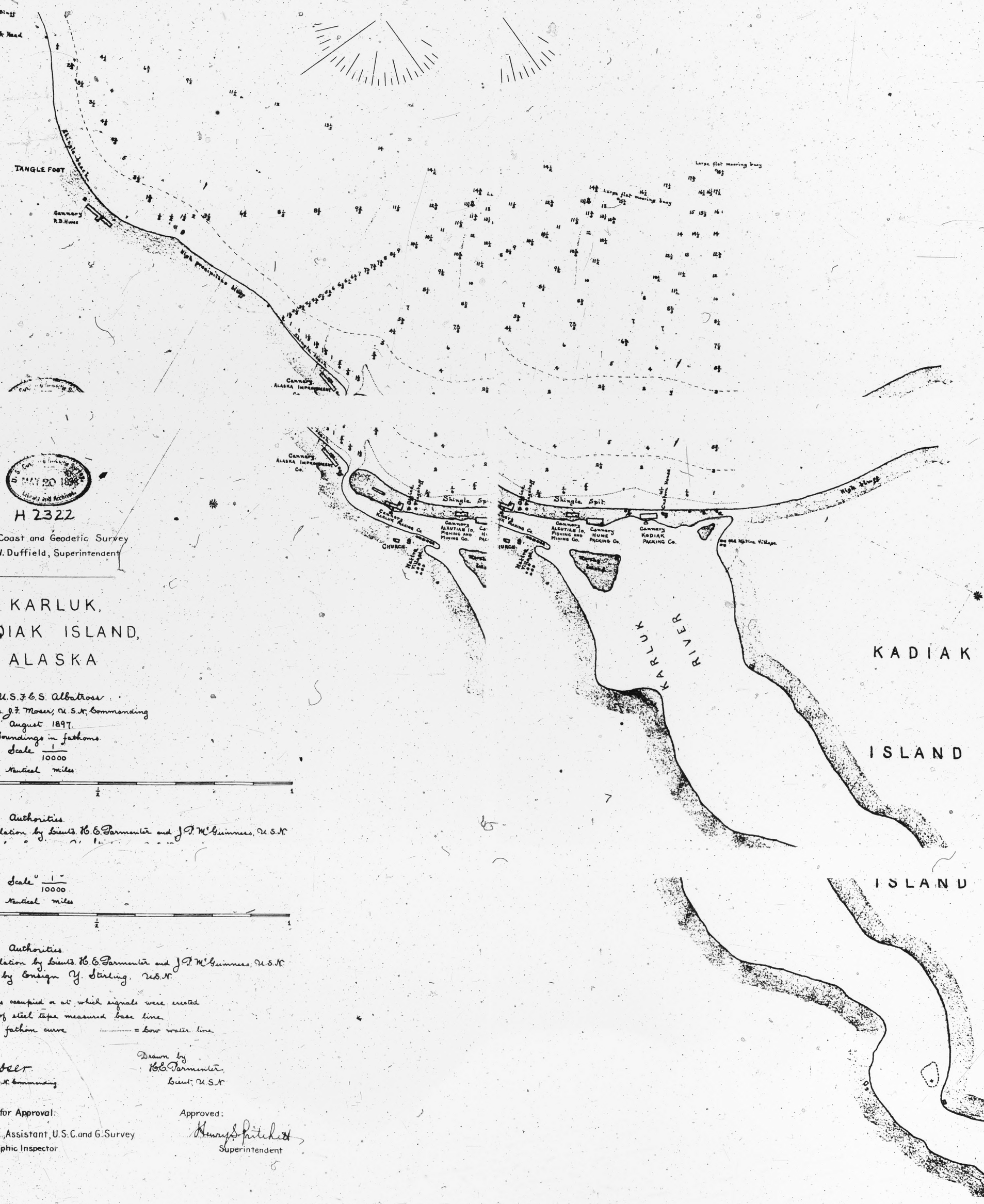
o = Stations occupied at which signals were erected
'a' & 'b' = Ends of steel tape measured base line
– – – – = Three fathom curve ..... = Low water line

Approved
J.F. Moser
Lieut. Comdr, U.S.N. Commanding

Drawn by
H.E. Parmenter,
Lieut. U.S.N.

Recommended for Approval:
Assistant, U.S.C. and G. Survey
Acting Hydrographic Inspector

Approved:
Superintendent



IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 24.

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner*,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, McNEILL & LIBBY, FRANK McCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE:

Native Village of Karluk,
Alaska Native Brotherhood,
National Congress of American Indians,
Association on American Indian Affairs, and
American Civil Liberties Union.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PRELIMINARY STATEMENT.

The Native Village of Karluk is a community of Aleuts now numbering approximately 200[1] which has drawn its principal sustenance, for many centuries, from the lagoon

[1] See infra, p. 26. And see Office of Indian Affairs, *Tribal Relations Pamphlet* 1B, September 1, 1946, p. 9. An undetermined number of other Kodiak Natives reside at Karluk during the fishing season.

or harbor which the village borders. This lagoon comprises one of the most prized native fisheries in Alaska, since the water is shallow enough to permit the taking of fish by simple and inexpensive gear operated from the beach by the natives.

When Russia ceded Alaska to the United States the property rights of the Karluk Natives were safeguarded by a clause of the treaty of cession in which the United States undertook to protect these natives in the enjoyment of their property.[2] That promise the Government has tried faithfully to perform. In the First Alaska Organic Act of May 17, 1884 (23 Stat. 24), the United States protected the Alaskan natives "in the possession of any lands actually in their use or occupation or now claimed by them." This protection was repeated in the Act of March 3, 1891 (26 Stat. 1101). The reservations thus accomplished in 1884 and 1891, though vague and indefinite in scope, served their purpose for some decades, since there were very few non-Indians in Alaska to raise questions about the boundaries of lands that natives used or occupied or claimed. In recent years the need for a more specific definition of native land holdings became pressing. Finally by the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a) the Congress authorized the Secretary of the Interior to designate and define, by metes and bounds, the areas which had been or should be reserved for native use. The chief purpose of the 1936 Act was said to be to fulfill the nation's "moral and legal obligations in the protection of the economic rights of the Alaska natives" (H. Rep. No. 2244, 74th Cong., 2d Sess., p. 3; S. Rep. No. 1748, 74th Cong., 2d Sess., p. 3). The legal obligation was traced to the Act of 1884, and the Congressional Committees reporting the 1936 legislation pointed

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[2] The Aleuts, as Christian subjects of the Czar, were protected by Clause 3 of the Alaskan Treaty of Cession of 1867, which pledged that they should be "maintained and protected in the free enjoyment of their rights, property and religion." 15 Stat. 539.

Government that this Act included submerged lands as well as dry lands, that such was the intention of Congress and the understanding of administrators and Indians alike, and that a contrary interpretation would fly in the face of a long and consistent history of legislation, executive action, and court adjudication. Petitioners seek only to supplement the Government's brief on this point by calling this Court's attention to the factual and legislative history and context of the 1936 Act.

3. The Interpretation of the White Act of 1924.

Again, the petitioners herein have no fault to find with the arguments of the Government brief on the interpretation of the White Act. We agree that an act passed in 1924 could not possibly repeal or limit the 1936 Act. We agree that the White Act was not intended to limit the establishment of native reserves. We agree that the specific application of the White Act at Karluk will aid in the conservation of Alaska's rapidly diminishing fishery resources as well as in the conservation of its even more limited human resources. We wish only to add to the excellent presentation of the Government's brief on this issue a commentary on the factual background of this issue. We think that an appraisal of the legal issues centering about the White Act can be more realistic and more just if it takes account of the present-day actualities of commercial fishing on the maritime public domain of Alaska.

ARGUMENT.

Point I.

The Circumstances Under Which This Suit Was Instituted Illustrate the Impropriety of Litigating Title in the Absence of the Only Title Claimants.[5]

What actually happened in this case may have some bearing upon the question of proper parties. The case was arranged by the plaintiff companies, who sought to establish jurisdiction for a suit in Alaska by having the nominal defendant threaten to arrest all fishermen who were fishing for the companies (R. 72-75, 77-78, 134, 168, 332, 335, 400, 449-451). While statements were made by the defendant (R. 460, 133-134, 449-453, 72-79) which the trial court construed as amounting to threats of wholesale arrests (R. 34), these statements were explicitly disavowed by the Department of the Interior, on the advice of the Department of Justice, before the institution of this suit. (R. 459) In fact, the threat was an empty gesture, so understood by all concerned, since all fishermen had complied with the very modest licensing system established by the Native Village of Karluk as authorized by the Secretary of the Interior (R. 128, 189, 191, 412-413). This threat of wholesale arrests was calculated: (a) to make the Indian position look as unreasonable as possible and (b) to make it as difficult as possible for the Indians, the Commissioner of Indian Affairs, or the Secretary of the Interior to appear in court (600 miles from the Karluk Reservation[6] and 5,000 miles from Washington) for the

[5] Neither plaintiffs nor defendant claim title here, yet plaintiffs seek an adjudication that equitable title to the Karluk Lagoon is in the United States which does not claim it, and not in the Village of Karluk, which does; and they seek such adjudication in a suit to which neither the United States, the undoubted legal owner, nor the Village, which claims to be the equitable owner, is a party litigant.

[6] The bare statement of mileage does not make clear the difficulties of travel. In fact, of the two Government officials most familiar with the facts of this case, one was drowned off the Kodiak coast and the second was unable to reach court in time to testify. The trial court refused to grant a continuance to permit such testimony. (R. 89-93)

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out that it "in reality carries out the promise of this Government contained in its act approved on May 17, 1884" (*Ibid.*). The moral obligation has its origin in the pledges made by the United States in the Treaty of 1867.

In 1943 this long drawn out process of definition, recognition and confirmation of native possessions was completed for the Karluk Natives by the issuance of Public Land Order No. 128 (8 F. R. 8557). The validity of that Order has now been challenged. The issue in this case involves the good faith of the United States in the performance of the conditions upon which it received the Territory of Alaska. It involves also the continued existence of a community of natives who face the seizure of their chief source of livelihood.

The Native Village of Karluk, a municipal corporation,[3] was not made a party to the present suit, which was brought by the plaintiff canning companies against a local official of the Fish and Wildlife Service. The municipality seeks an opportunity now, for the first time, to present for judicial consideration the nature of its interest in the lands which are the subject of this suit. On September 27, 1948, the Acting Commissioner of Indian Affairs approved the selection by the Native Village of Karluk of the attorneys who are submitting this brief.

The other organizations which join in this brief are concerned that the United States shall not deal unjustly with a poor and helpless community of natives who see themselves deprived of their chief source of livelihood. The organizations submitting this brief are also concerned with the precedent which this seizure may set for other and further assaults upon the possessions of Alaskan Natives, who are

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[3] Incorporated as a municipal corporation under section 17 of the Act of June 18, 1934 (48 Stat. 984, 987, 25 U. S. C. sec. 477) and section 1 of the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 362), and subject to suit as such (Charter of Native Village of Karluk, ratified August 23, 1939, section 4).

being systematically impoverished and decimated.[4] But above all, they are concerned that the United States shall maintain good faith in the eyes of the world in discharging its obligations to the most helpless of its minorities. They are shocked at the implications that may be drawn from the statement of the Circuit Court of Appeals in this case that "The American way of the profit motive often leaves unjustly behind minority groups of lesser education and initiative." (R. 511.) They believe that it is the highest function of our courts to see that justice is done even to minority groups of lesser education and initiative. What is at stake in this case is not an ancient wrong to ancestors of those who now seek redress; it is a present assault, recently initiated and not yet fully consummated, against the basic human rights of the Karluk Natives who seek the protection of this Honorable Court.

THE ISSUES.

The strictly legal issues in this case have been lucidly presented in the brief of the Government. The *amici curiae* herein endorse that brief in its entirely. The purpose of

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[4] "The reservations heretofore established and the proposed reservations are in areas occupied and used by the natives and their ancestors since time immemorial. These lands constitute the economic bases for native life. The exploitation and spoliation of some of the ancestral hunting, fishing and trapping grounds of the natives by non-natives have already worked a hardship on many of the native groups and seriously jeopardized their economic situation. Unless the natives are protected in their occupancy and use of these ancestral areas and are permitted to establish their local governments, the virtual destruction of these people is almost sure to result." Report of Secretary Krug on S. J. Res. 162, dated February 18, 1948. Hearings before Subcommittee of Sen. Comm. on Interior and Insular Affairs, 80th Cong., 2d sess., on S. J. Res. 162, p. 3. "Medical Conditions in Alaska," *American Medical Association Journal*, October 25, 1947, pp. 501-503, reports a tuberculosis death rate among Alaska natives 23 times as great as that for the general population of the United States.

purpose of explaining the reasons for the reservation. An affidavit signed by the Under Secretary of the Interior on July 3, 1946, explaining the reasons for the Karluk Reservation and the circumstances leading to its establishment was excluded from the record by a ruling of the trial court excluding affidavits and by the holding that since all reservations of submerged lands are unlawful, the reasonableness of any particular reservation was not properly in issue.

The result is that the record is not as satisfactory as might be desired with respect to the facts showing prior use and occupancy of the land in question and the canning companies' practice of forcefully removing the Karluk natives from their beaches to a nearby "rock dump", which was the immediate occasion of the reservation proclamation.[7] Over the Government's repeated objections (R. 72-89), the plaintiffs succeeded in conveying to the trial court and the Circuit Court a distorted picture of the facts and the issues.[8]

These considerations lend special significance to the Government's argument that the court below was without jurisdiction to declare the Karluk reservation of submerged lands invalid (R. 39), even if it had jurisdiction to enjoin the threats of arrest which plaintiffs themselves induced the nominal defendant to make.

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[7] It is submitted that the Under Secretary's affidavit is a public record relevant to the issues in this case, and it is accordingly set forth, for the information of the Court, in an appendix to this brief. See p. 23, *infra*.

[8] Not only are the supposed "facts" of the instant case—the "threat of wholesale arrests," the alleged long-continued use of the native beach seining area by the plaintiff companies, and their alleged dependence upon fish caught within that area—pure fabrications, but the history of Karluk and of the Alaskan Natives generally which the plaintiffs advanced in the courts below is equally fictional. The most important fact that is distorted is the fact that, at least since 1884, occupancy of beaches and bays by white or native fishermen or groups or companies has been recognized and generally respected. Thus practically every Indian reservation in

CITATIONS.

CASES:

STATUTES AND TREATIES:

Point II.

The Factual and Legislative Context of the 1936 Act Emphasizes the Absurdity of an Interpretation of That Act Which Limits "Land" or "Public Land" to "Dry Land."

The basic substantive question in the case at bar is the question of the meaning of the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a).

The Government's brief contains an accurate and illuminating account of the legislative history and administrative construction of the 1936 Act. Additional light, however, may be thrown upon the meaning of the 1936 Act if it be noted that the 1936 Act was an amendment to the so-called "Wheeler-Howard Act" of June 18, 1934 (48 Stat. 984, 25 U. S. C., sec. 461, et seq.). The 1934 Act thus furnishes the legislative context in which the Alaskan reservation provision here in question can be most fairly construed.

The Wheeler-Howard Act of 1934 was an attempt to help Indians to help themselves to a more adequate standard of living. To this end it did three things: (1) it provided that Indians should have increased control of their own reservation resources; (2) it authorized the protection and expansion of the Indian resource base, and (3) it sought to direct the nation's considerable expenditures for Indian welfare to such productive purposes as the purchase of land, and

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Alaska (of which about 120 were established between 1890 and 1936), included water areas, although in only a few of these, such as Tyonek, Amaknak, Chilkat, Hydaburg, and Annette Island, does the verbal description of the reservation make it clear that ocean waters are included. The idea of a fishermen's reservation that does not dip below the line of high tide, or even the line of low tide, is an economic and historical absurdity. Equally absurd is the idea that Karluk is the only place where beaches and harbors are exclusively occupied or "monopolized" by the adjacent land owners or first occupants,—a point discussed more fully *infra*, under Point III.

the instant brief of *amici curiae* is primarily to assist this Court in exploring the factual, legislative and administrative context of the issues before it and in appraising the facts that bear on social policy or value judgments which are implicit in those issues.

This case raises three principal issues: (1) a preliminary question of jurisdiction; (2) a substantive question of the proper interpretation of the provision of the Act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a) authorizing the proclamation of native reservations in Alaska, and (3) a subsidiary question of the statutory interpretation of the "equality" proviso of the White Act of June 6, 1924 (43 Stat. 464, 48 U. S. C. secs. 221 et seq.) governing fishing reservations in Alaska. Each of these issues may be clarified by reference to the factual background out of which the issues emerge.

1. The Question of Jurisdiction.

The chief jurisdictional question in this case is the question whether, when the United States asserts that it holds certain tidelands and submerged lands in trust for a Native Community of Aleuts, third parties may properly challenge that assertion, by bringing suit against a friendly government employee who has nothing to do with the assertion or administration of that trust, without the United States or the responsible Federal official (in this case the Secretary of the Interior) or the beneficiaries of the trust being parties to the litigation.

The actual circumstances under which this suit was brought, which have been politely passed over heretofore in the briefs of the Government and the plaintiff companies, indicate the unwisdom of litigating questions of Federal or Indian title in this manner.

2. The Interpretation of the 1936 Act.

On the substantive side of the case the fundamental question is that of the proper interpretation of the Act of May 1, 1936. Petitioners agree with the argument of the

MISCELLANEOUS:

with reference to the Alaska native rights and needs may indeed be a sobering guide to the future disposal of the remaining unpreempted resources to which the natives may have color of title, actual title or need.

"* * * The obligation remains to afford these Indians, that which they had, an opportunity to envision a stabilized and assured continuance.

"As pointed out above, this can be gained by securing today certain rights to fishing areas, to fish trap sites, to water power, to garden plots, to mineral resources, to logging areas, by giving protection against 'China System' and contract labor or financial encouragement in the form of reimbursable loans for the erection of canneries. This program is largely legislative; of a regulatory and budgetary nature. * * *"[15]

The 1936 Alaska Act was evolved as a part of this proposed program.

Plaintiff companies are asking the courts to overrule the decision of the legislative and executive arm of the government that the best public use that can be made of the Karluk beach and harbor is to reserve it for the use of Karluk Village. They advance in support of this contention no facts of significance other than the amount of their investments and the size of their financial hopes.

4. *Historical Background*

While the Wheeler-Howard Act of 1934 itself furnishes the best guide to the interpretation of its 1936 amendment, the fact that this 1936 amendment incorporates by reference two earlier acts of 1884 and 1891 makes the historical interpretation of their reservation provisions a relevant guide in the interpretation of the 1936 Act. Both these acts have been consistently interpreted by the judicial and executive

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[15] Memorandum of Paul W. Gordon, Director of Education for Alaska, dated March 16, 1934, approved by Commissioner of Indian Affairs, June 8, 1934, transmitted to House Committee on Indian Affairs, with the endorsement of the Secretary of Interior, on March 8, 1935, for consideration in connection with the then-pending Tlingit-Haida Jurisdictional Act of June 19, 1935, 49 Stat. 388.

branches of government as covering submerged lands as well as uplands. *Sutter* v. *Heckman*, 119 Fed. 83; *Johnson* v. *Pacific Coast S. S. Co.*, 2 Alaska 224; *Miller* v. *United States*, 159 F(2d) 997; 24 L. D. 312; 49 L. D. 592; 57 I. D. 461.

When the 1884 act was passed, the committee chairman sponsoring the legislation declared:

> "It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use". (15 Cong. Rec. 531)

A report made on July 30, 1885, by the Board of Indian Commissioners, pursuant to section 12 of the 1884 act, contained this recommendation:

> "The fisheries occupied by them (natives) before the advent of the whites should also be secured to them against encroachment."

This Court is familiar with the fact that guaranties of Indian fishing rights and the protection of such rights against white encroachment formed a standard feature of our early dealings with Indians, *Sampson Tulee* v. *State of Washington*, 315 U. S. 681; *United States* v. *Winans*, 198 U. S. 371; just as similar protection of native fishing rights characterized our dealings with Hawaii, *Damon* v. *Hawaii*, 194 U. S. 154; *Carter* v. *Hawaii*, 200 U. S. 255. What was said of the Pyramid Lake Reservation in Nevada in *United States* v. *Sturgeon*, 27 Fed. Cas. No. 16413 is relevant to the case at bar:

> "It is plain that nothing of value to the Indians will be left of their reservation if all the whites who choose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law."

infringe on native possessions.[17] Although the United States never made a treaty with the Karluk Natives, it did make a treaty in 1867 with their sovereign, the Czar of Russia, who was humane enough to insist that the property rights of these and other civilized natives should be protected.

The pledge of the Government of the United States to protect the property rights of the Karluk Natives has been faithfully honored by the Congress and the Executive. The question in this case is whether fulfillment of that international obligation may be enjoined by the courts at the suit of persons who quite conceivably may make larger profits if the United States forgets its treaty obligations to the original inhabitants of Alaska but who have no other interest in the subject matter of this suit.

This case does not involve the issue raised in *Alcea Band of Tillamooks* v. *United States*, 329 U. S. 40, as to whether the land rights of the Karluk Natives are of such a character as will ground a suit against the Government for failure to respect and protect those rights. Here the Government has done its best to protect those rights for 81 years, from the signing of the treaty of cession in 1867 to the filing of the Government brief in this case in 1948. The only question is whether the land right or land claim of the Karluk Indians is such that the Government of the United States may recognize it and protect it from interference. Such protection is not discrimination in any invidious sense. The

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[17] The Ukase of March 5, 1841 provides:

"Sec. 282. Should the Colonial Administration consider it advantageous to establish factories, redoubts, or so-called 'one-man posts' in various parts of the American continent, for the safeguarding of its commercial interests, it shall obtain the consent of the natives to such action, using every endeavor to preserve pacific relations with them and to avoid arousing the suspicion of any desire to encroach on their liberty." (Ukase of March 5, 1841, translated by R. H. Geoghegan.)

the establishment of credit facilities for economic development of reservation resources.[9]

Each of these provisions was extended, with minor modifications, to Alaska, and the Alaskan modifications of this Act can hardly be understood without reference to the Act's general provisions.

1. *Defining Reservations.*

Giving the Indians increased control of reservation lands[10] made it necessary to define more clearly existing Indian reservation boundaries. Whether a piece of land, dry or submerged, was or was not part of an Indian reservation was a question of little importance so long as the Government felt free to change Indian reservation boundaries, from time to time, to meet the needs of white settlers,[11] or even hostile tribes.[12] Indian reservations were often left in prudent obscurity, not only in Alaska, under the Acts of May 17, 1884, and March 3, 1891, but even in Continental United States, and it was necessary for this Court in 1938 to look carefully into the legislative history of appropriation acts to determine whether a tract of land in Nevada really was an Indian reservation.[13]

Section 7 of the Wheeler-Howard Act of 1934 (25 U. S. C. sec. 467) sought to diminish this obscurity by authorizing the Secretary of the Interior, under certain circumstances,

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[9] The purposes and legislative history of this act are sketched in F. S. Cohen, *Handbook of Federal Indian Law* (1945) pp. 84-86, and the extension of the act to Alaska is discussed at pp. 413 and 415 fn. 216.

[10] This was particularly a consequence of section 16 of the Act of June 18, 1934, 48 Stat. 984, 986, 25 U. S. C. sec. 476, which gave organized Indian councils control of the disposition of Indian tribal lands and other tribal property.

[11] See *Ute Indians* v. *United States*, 330 U. S. 169.

[12] See *United States* v. *Shoshone Tribe*, 304 U. S. 111.

[13] *United States* v. *McGowan*, 302 U. S. 535.

to issue proclamations defining reservation boundaries that would otherwise be obscure. Section 1, of the Act of May 1, 1936, extended this section to Alaska, and section 2 of the 1936 Act supplemented this provision by giving the Secretary of the Interior a wide discretion in the definition of Indian reservations in Alaska. Foreseeing that an authority merely to mark out existing reservations would subject every such demarcation to attack in the court, where the question whether any particular demarcation went beyond the previously existing reservation could be endlessly litigated, the drafters of the 1936 Act expressly provided that if the Secretary went beyond existing reservations and included any part of the public domain, whether by mistake or through prudent generosity, this should not invalidate the reservation so proclaimed. That is why, after specifying the various existing reservations which the Secretary of the Interior was authorized to confirm to native occupants, the 1936 Act carries the catch-all phrase:

> "together with additional public lands adjacent thereto, within the Territory of Alaska."

The word "public" was used to assure miners, homesteaders, and other private claimants that their rights would not be disturbed. But except for this limitation and the limitation that he must not go beyond the Territory of Alaska, the Secretary of the Interior was given a very broad discretion. If he defined a reservation too narrowly, the Indians had no legal redress,—except by going to Congress for new legislation; if he defined it too broadly, the Indians' neighbors had no redress except by doing the same.

2. *Expanding Reservations.*

The Wheeler-Howard Act provided not only for the proclamation of continental Indian reservations but also for the addition of considerable areas of public domain and private land to existing Indian reservations. (There is no truth in the statement of the plaintiff companies (Br. in

Opp., p. 19) that the Wheeler-Howard Act "conferred no power to create reservations.") In continental United States millions of acres of "surplus" Indian lands left over after completion of the allotment process had been made part of the public domain but not yet paid for, the Indians being entitled to receive the proceeds from this land as it was disposed of. Section 3 of the Wheeler-Howard Act (25 U. S. Code sec. 463) gave the Secretary of the Interior the widest possible discretion to restore any or all of this vast domain to Indian ownership and reservation status.[14] This section could not have much, if any, application in Alaska, where Indian lands never had been allotted, but section 2 of the 1936 Act gave the Secretary a broad power to add public domain to Indian reservations similar to the power given the Secretary in the States by section 3 of the Wheeler-Howard Act of 1934. The provisions of section 3 clearly applied to lands under water, as well as to uplands, as is shown not only by the restoration of many water areas to Indian reservations, through administrative action under that section, but also by the fact that Congress in 1937 referred expressly to "water reservoirs" and "water rights" on the Papago Reservation in connection with the reference in section 3 to "lands. . . . opened to sale . . . by any of the public-land laws." (Act of August 28, 1937, 50 Stat. 862, 25 U. S. C. 463(b)(3).)

A fortiori, if section 3 of the 1934 Act was not limited to dry land in the States, its Alaskan analogue, section 2 of the 1936 Act, cannot reasonably be limited to dry land in Alaska, where the beneficiaries of the legislation are almost without exception fishermen, whose life centers on the line where land and water meet. See Kroeber, *Cultural and Natural Areas of Native North America*, p. 167.

3. *Aiding the Native Economy.*

Section 5 of the Wheeler-Howard Act of 1934 authorized the purchase, with Federal funds, of private lands for Indian use. In Alaska, where more than 99% of all land was

[14] Op. cit. note 9, pp. 84, 334-336.

still in Federal ownership, it was not necessary to dip into the public treasury to secure additions to the Indian resource base; such additions could be made directly out of the public domain. Congress clearly intended to help Alaskan native fishermen by assuring them of "land along the coast with fishing rights." (Hearings before H. R. Comm. on Ind. Affairs, 73d Cong., 2d sess., on H. R. 7902, p. 76).

The Congress that adopted the 1936 Act was familiar with the needs of the native coastal economy. Its Committees on Indian Affairs had received a document from the Department of the Interior, in connection with a related pending bill, which made the following observations on the liquid character of the native economy:

> "Preoccupied with land problems as they present themselves on the continental United States, our reflections may attach themselves entirely too much with the occupation and use of land itself. Just as in arid United States water rights may be of more value than the real estate under question, so in southeastern Alaska fishing rights in waters adjacent to certain lands may be of more value than the lands.
>
> "* * * But perhaps even more important, since their life was based largely on the salmon catch, the natives of southeastern Alaska had a well-defined recognition of the rights of individuals and families to the use of certain streams, channels and ocean areas for fish-taking. These locations were honored just as faithfully as if the sites were patented and recorded with a clerk of records. This system may be seen still operating on the Kuskokwim where without recourse to written records but with great fidelity to the dictates of custom, enforced by unwritten community decree, fish net locations are considered as belonging to a certain person, subject to disposal by deed or testament.
>
> "* * * Let me conclude then, as water is to irrigated land, fishing rights are to an Alaskan village site and as such have value greater than the site itself. The fishing fields are the harvest fields.
>
> "* * * A record sharply brought before us of our possible derelictions or lack of foresight in the past

Point III.

The Protection Which the Federal Government Has Sought to Extend to the Village of Karluk Under the White Act is Not a Violation of the Equality Proviso of That Act; Similar Protection Has Been Consistently Extended to Plaintiffs and Other Non-Indian Claimants of Possessory Rights in Alaskan Fisheries.

Plaintiffs in this case have sought to present the issue as if it were one of discrimination against white men or white corporations. But this is not a case where the United States has taken a fishery from white men and given it to Indians as a matter of charity, and we do not here address ourselves to the question how such a case should be decided.

The distinction that the Congress and the Secretary of the Interior drew between the plaintiff companies and the Karluk Natives was not a racial distinction but a distinction between trespassers and property owners. It is exactly the same sort of distinction that the plaintiff companies insist upon when they bar trespassers from their cannery grounds or from trap fishing within a mile of their traps. (See, for example, Alaska Commercial Fishery Regulations, 1946, sec. 208.21).

The basic fact which the plaintiffs consistently ignore is that fishing from beaches and tidelands in Alaska is never open to all comers at all times and could not be without endless confusion and violence. The man who has his gear on the beach first has a prior right and a right to exclude others from interference with his operations. Regularly the Government, under the White Act, has tried to protect beach gear operations from interference. The area of 3000 feet from shore, used in the challenged Public Land Order No. 128, was administratively fixed and judicially approved, as the area of water in which beach operations must be assured of freedom from interference if they are to be successful. *Alaska Pacific Fisheries Co.* v. *United States*, 248 U.S. 78. The progress of the Annette Islanders, under that decision, inspired the legislation and the Executive Order

which are here challenged. Hearings before H. R. Comm., on Indian Affairs, 73d Cong., 2d sess., on H. R. 7902, p. 498.

Literally construed, as the plaintiff companies would have us construe the clause in this case, the equality proviso of the White Act would mean that a white man had the same rights on the Karluk beach as a member of the Village. But by the same literal construction, the Natives of Karluk could not be excluded from the canneries, oyster beds, or trap sites occupied by the plaintiff companies and other canning companies on the Alaskan coast. For the equality proviso applies to the right to "prepare, cure, or preserve," as well as the right to "take" fish or shellfish. And if this proviso be literally construed, no citizen of the United States could be excluded from preparing, curing, or preserving fish in the plaintiff companies' boats and canneries, or from taking fish from within the plaintiff companies' fish traps.

What all this indicates is that, as Judge Rutledge clearly recognized in his lucid opinion in *Dow* v. *Ickes*, 123 F(2d) 909, cert. den., 315 U. S. 807, the equality proviso of the White Act should not be literally construed, but should be understood as consistent with administrative distinctions based, in good faith (even if that good faith be ill-advised), upon priority of use, priority of application, or other relevant social considerations. The Alaska Commercial Fishery Regulations for 1946 contain numerous provisions in line with the suggestions of that opinion. See, particularly, sections 201.21b, 201.23, 201.24, and 201.25.

The real question in the case, then, so far as the White Act proviso is concerned, is whether a distinction between the rights of plaintiff companies and the rights of the Karluk Village may properly be predicated on the fact that the people of Karluk Village used and claimed the beach in question long before the plaintiff companies arrived on the scene.

The allocation of preference to prior possession is nothing new in the Alaskan fisheries. Rather it is the standard practice, and nobody has ever suggested prior to the institu-

tion of this case that this practice was forbidden by the equality clause of the White Act.

To be sure the Karluk Natives did not have notarized deeds to their village sites and fishing grounds before the white man came to Alaska. They had other ways of publicizing the fact of ownership based on long continued possession, "one of the profoundest factors in human thought" (Holmes, J., in *Carino* v. *Insular Government of Philippine Islands*, 212 U. S. 449). But in any event the Karluk Natives' possession of the lagoon which fed them was recognized by the Russians, who "did not assume to convert all the native inhabitants into trespassers or even into tenants at will" (*ibid.* at p. 460).[16] In fact, the Russian Czar ordered officials of the Russian-American Company not to

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[16] The attitude of the Russian Czars is explicitly stated in a memorandum prepared at the request of Secretary Seward, by State Counsellor Kostlivtzov, November 21, 1867. The following excerpt is from a translation of this memorandum found in House Executive Document, No. 177, 40th Congress, 2nd Session.

". . . neither the government nor the company had any interest to interfere with the distribution of lands between the inhabitants of the Aleutian Islands. All these islands, the boundaries of which are fixed by nature itself, are held and used by the Aleuts by right of prescription, never interrupted by any foreign violation or interference. The division of lands between the Aleutian settlements was established at a time anterior to the Russian occupation and continues to be inviolably preserved according to usages prevalent of all antiquity amongst the natives."

The most important of the Aleut land holdings so recognized were the Aleut fishing grounds, according to another memorandum of November 21, 1867, from Mr. C. M. Clay, U. S. Legation, St. Petersburg, Russia to Secretary of State Seward: " . . . the soil itself being perfectly barren, and unfit either for agricultural or grazing purposes, there is no reason why the natives should endeavor to extend the limits of their lands; if they value their grounds, it is exclusively on account of streams abounding in fish, or of coast sites, designated by the local name of Liyda . . ."

Karluk Village fishing ground is to be protected from any enterprising Eskimo or Osage Indian who might wish to displace Karluk fishermen from their accustomed fishing places, as well as from white entrepreneurs. The only question of discrimination that is raised in fact is the question whether the protection ordinarily given to property owners—even to owners of such tenuous possessory rights as may be enjoyed by the first occupant of a fish trap site, as long as he occupies it, under the White Act regulations—shall be denied to groups which the court below has characterized as "minority groups of lesser education and initiative". It is the plaintiffs who are seeking to establish a permanent discrimination against the Native population of Alaska and to frustrate the efforts of the Government to give them the same measure of protection that it gives to other fishermen who have had the good fortune to occupy a choice fishing ground first.

The plaintiff companies,[18] acting through the Alaska Salmon Industry Inc., and able attorneys who represent them, have advised Congress that the continuance of their industry depends upon Federal recognition and protection of their possessory claims in Alaska fishing waters, claims which are based on alleged priority of use and occupancy.[19] In seeking legislative confirmation of their own occupancy rights in trap sites in Alaskan waters the plaintiff com-

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[18] The plaintiff Libby, McNeill and Libby was the third largest claimant of fish trap sites in Alaskan coastal waters, when this suit was instituted. The plaintiff San Juan Fishing & Packing Co. was the eighth largest claimant of such sites. See Hearings before Subcommittee of Committee on Merchant Marine and Fisheries, H. R., 79th Cong., June 24, 1946, p. 6.

[19] *Ibid.* pp. 3 et seq. And see testimony of attorneys for Alaska Salmon Industry Inc., in Hearings before Subcommittee of Senate Committee on Interstate and Foreign Commerce, and Subcommittee of House Committee on Merchant Marine and Fisheries, 80th Congress, 2d Session, on S. 1446 and H. R. 3859, pp. 27, 37-38, 53, 106.

panies claim to be carrying out the true purposes of the White Act.

Yet when native communities seek to rely upon a priority of occupancy that goes back not years but centuries, and the Government seeks to recognize and protect that occupancy (as it did for the occupancy rights of the Hualapai Tribe in *United States* v. *Santa Fe Pac. R. R.*, 314 U. S. 339), the charge of racial discrimination is raised.

Possession and the right of first occupancy are not racial matters. If nobody has any possessory or occupancy rights in the waters or tidelands of Alaska, this Court should so declare, and the fish trap sites, cannery sites, oyster beds and docks now in the possession (generally without benefit of patent) of plaintiffs and other canning companies will all revert to the public. But if any possessory rights or occupancy rights of white companies are recognized by the Federal authorities, then it is surely not discriminatory to recognize that native communities may have similar rights and that the Federal Government may protect such rights as assiduously as it protects the rights of men of other races.

Plaintiffs have tried, for many years, to persuade Presidents and Congresses to repudiate the solemn pledges under which the Native Village of Karluk holds its ancient fishing grounds. Unsuccessful in this effort,[20] they now ask the courts to legislate the Karluk Reserve out of existence.

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[20] The last Congress was asked to invalidate the Karluk Reservation (S. J. Res. 162, 80th Congress), but declined to do so. Earlier Congresses had been asked to repeal the entire Wheeler-Howard Act, but also declined to do so. See S. 2103, 76th Cong.; S. 1218, 78th Cong.; S. 978, 79th Cong.

CONCLUSION.

The judgment of the court below should be reversed.

Respectfully submitted,

NATIVE VILLAGE OF KARLUK,
ALASKA NATIVE BROTHERHOOD,
NATIONAL CONGRESS OF AMERICAN INDIANS,
ASSOCIATION ON AMERICAN INDIAN AFFAIRS,
AMERICAN CIVIL LIBERTIES UNION,
Amici Curiae.

By Their Attorneys:

FELIX S. COHEN,
1624 Eye Street, Northwest,
Washington, D. C.

JAMES E. CURRY,
1016 - 16th Street, Northwest,
Washington, D. C.

HENRY COHEN
and
JONATHAN BINGHAM,
10 Rockefeller Plaza,
New York, New York.

OCTOBER, 1948.

APPENDIX.

AFFIDAVIT.

I, Oscar L. Chapman, Under Secretary of the Interior, first being duly sworn, depose and say:

1. I have served in the Department of the Interior as Assistant Secretary, as Under Secretary and, from time to time, as Acting Secretary since May 5, 1933;

2. On March 22, 1946, as Acting Secretary, I approved and promulgated Commercial Fishing Regulations for Alaska, including therein the following regulation, section 208.23(r):

> "Sec. 208.23. *Waters closed to commercial salmon fishing.* All commercial fishing for salmon is prohibited as follows:
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> * * * * * * * * * * *
>
> "(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32′ 30″ N., thence northeasterly along said shore to a point 57° 39′ 40″.
>
> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250)."

3. The primary purpose of this regulation was to protect and conserve the salmon supply of the Karluk River and this regulation was adopted in the light of the following facts of record in the Department of the Interior:

> (a) The Karluk River and the water area surrounding the Native Village of Karluk has long been known to constitute one of the most productive red salmon areas in the world. For many years the history of the commercial exploitation of the salmon of this area has been marked by a high rate of exploitation with little regard to the effect of such exploitation on the continuance of the salmon supply. While stocks dwindled, fish-

ing efforts redoubled in intensity, and the amount of gear in operation increased by leaps and bounds in an effort to increase the size of the commercial pack. Such practices threatened eventual depletion of the salmon supply and final extinction of the industry dependent thereon.

(b) Special regulations adopted for this area from time to time and particularly regulations abolishing traps and limiting seine fishing have alleviated the situation to some extent. However, in its most recent bulletin concerning salmon in the Karluk River, Alaska, issued in 1944, the conclusion of the Fish and Wildlife Service is that from 1888 to 1934 there has been a marked reduction in the abundance of Karluk River red salmon. (Fishery Bulletin 39). A copy of the table showing the commercial catch of Karluk River red salmon from the beginning of the commercial canning industry in 1882 to 1936 is attached.

4. Section 208.23(r) of the regulations will in my judgment help to conserve the supplies of fish in the Karluk area, to protect the dwindling salmon supply, and to create conditions which will lead to the enhancement of the supply of salmon for future consumption.

5. A special exception was included in section 208.23(r) in favor of the Natives of Karluk in view of the following facts and circumstances of record in the Department of the Interior:

(a) The Aleutian community of Karluk on Kodiak Island, Alaska, has been in existence since time immemorial and during its entire existence, the Natives of Karluk have depended for their livelihood on the salmon supply of Karluk River. When the first Russian explorers discovered this area they found the native community well established and engaged in extensive fishing activities. These natives are recorded as selling fish in large quantities to the Russians as early as 1795. The area which the Natives of Karluk have always used for their fishing surrounds the mouth of the Karluk River and the beach extending a few miles along the coast line. For the most part, the natives have fished from the beach with beach seines or more primi-

tive gear and have had to wait for the runs to come to the Karluk River to obtain their fish supplies for subsistence and trade.

(b) Since March 16, 1931, the Office of Indian Affairs has been charged with responsibility for the welfare and protection of the Natives of Karluk.

(c) During several seasons prior to 1943, the Natives of Karluk were compelled by outsiders to vacate their usual fishing area, during the fishing season, and to conduct their own fishing operations in the far corner of the lagoon known as the "Rock Dump." When the natives fished there, they used short gill nets in spaces between the rocks near the shore and snared a few salmon that happened to venture into the nets. In many cases outsiders, fishing with purse seines from boats, interfered with native efforts at beach seining and actually scooped the fish out of the beach seines of the natives.

(d) These infringements upon the fishing areas and fishing operations of the Karluk natives threatened the principal source of their income and livelihood and threatened to make them public charges of the Federal Government unless the native use of these waters was protected from such interference by outside fishermen.

(e) On March 23, 1942, the Office of Indian Affairs, through Assistant Commissioner William Zimmerman, Jr., recommended the establishment of a reservation for the natives of Karluk, pursuant to the act of May 1, 1936 (49 Stat. 1250, 48 U. S. C. sec. 358a). This recommendation included the following statements, which were carefully checked and confirmed by the General Land Office, the Fish and Wildlife Service, and other interested bureaus and offices of the Department of the Interior:

> "The proposed reserve is located in the western part of Kodiak Island off the southern shore of Alaska and covers approximately 55 square miles, or 35,200 acres of land area, and the water area adjacent thereto extending 3,000 feet from the shore line at mean low tide. Kodiak Island is bordered on the north and west by Shelikof Strait, which separates it from the Alaska Peninsula. Within the area

above described is included a small tract of not to exceed 40 acres reserved for educational purposes by Executive Order of March 4, 1930.

"The native Aleuts of Karluk have been forced out of their fishing area by outsiders who are transported to their village each summer from the States. The mouth of Karluk River and the two miles of beach immediately in front of the village is the area desired and has been used by the natives of Karluk for many years. The natives are crowded out of this locality and are now forced to leave the village to work in canneries or fish in a far corner of the lagoon or beach which is known as the "rock dump". The Karluk natives have been fishing commercially in the mouth of Karluk River and lagoon since 1867 and each year they have been crowded back until their fishing area is gone. The area requested by the natives does not include any canneries but only some cannery buildings owned by the Alaska Pacific Association. The Karluk cannery has not operated since 1911.

"The natives of Karluk have organized under the provisions of the Indian Reorganization Act and are operating under their own constitution and charter. Approximately 200 native Aleuts reside at Karluk throughout the year. They are a fine group of people, eager for an education, willing to work out their own salvation, and should be given a reserve to protect them from the exploitation of outsiders. There are no inhabitants except the natives living within the requested reserve area other than a few itinerant whites.

"In addition to the fishing, which is the main industry, the proposed reserve provides good fur trapping, which is carried on as a winter occupation. The natives can also raise gardens in the fertile land back of the village. Many of the older people plant small plots in their yards that have grown unusually well."

(f) The Secretary of the Interior on May 22, 1943, established the Karluk Reservation, which reservation was ratified by the natives of Karluk on May 23, 1944. This action was taken in accordance with the foregoing recommendations and with the view of the Solicitor of the Department of the Interior that a proper basis for

the establishment of a reservation including tidelands and waters 3,000 feet from shore was to be found in the fact (a) that the proposed reservation comprised a reservation formerly under the jurisdiction of the Department of the Interior and used for village purposes by the Karluk natives, (b) that part or all of the area of the proposed reservation had been occupied by the Karluk Native Village since 1884 and long prior thereto, and (c) that any land within the proposed reservation not included within the foregoing categories was "public land adjacent thereto." Throughout the consideration of the proposed reservation the purpose of protecting the beaches and adjacent waters which constituted the native fishing areas was paramount.

(g) In accordance with the policy established by the Congress in the acts of 43 Stat. 466, 48 U. S. C. sec. 234, 57 Stat. 306, sec. 9, 48 U. S. C. sec. 198, the Department of the Interior has undertaken in the case of Karluk Reservation, as well as in other cases, to give special consideration to the needs of the natives, allowing them to fish under circumstances where nonnative fishing may be forbidden. Such exceptions are entirely consistent with a wise conservation policy, since the history of native fishing and the permanent interests of the permanent native community in maintaining a permanent supply of salmon are such as to give reasonable assurance that the amounts of fish taken by the natives themselves or by third persons operating under their direction and authority will be only such as do not endanger the continuance of the salmon supply. The natives have been advised that their activities in fishing and allowing outsiders to fish are subject to the supervision of this Department in the interests of conservation and all such action is being taken in consultation with the Department and with its approval.

(Sgd.) Oscar L. Chapman.

Sworn to before me this 3rd day of July 1946.

(Sgd.) Bernice Kirschling,
Notary Public.

(Seal)

My commission expires 12/31/47.

Catch of Karluk River Red Salmon From Beginning of the Canning Industry in 1882 to 1936.

Year	*Number of Fish*	*Year*	*Number of Fish*
1882	58,800	1910	1,492,544
1883	188,706	1911	1,723,132
1884	282,184	1912	1,245,275
1885	468,580	1913	868,422
1886	646,100	1914	540,455
1887	1,004,500	1915	828,429
1888	2,781,100	1916	2,343,104
1889	3,411,730	1917	2,324,492
1890	3,148,796	1918	1,094,665
1891	3,500,588	1919	1,089,809
1892	2,852,458	1920	1,368,526
1893	2,909,508	1921	1,643,119
1894	3,349,976	1922	658,159
1895	2,055,984	1923	730,170
1896	2,688,976	1924	890,839
1897	2,204,425	1925	1,323,302
1898	1,534,064	1926	2,386,335
1899	1,399,117	1927	714,790
1900	2,594,774	1928	1,000,774
1901	3,985,177	1929	227,399
1902	2,981,112	1930	167,091
1903	1,319,975	1931	751,889
1904	1,638,949	1932	674,407
1905	1,787,642	1933	845,423
1906	3,382,913	1934	919,200
1907	2,929,886	1935	654,817
1908	1,608,418	1936	1,077,831
1909	923,501		